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RECESSION OF THE SUPERNATURAL IN JUDICIAL INVESTIGATION

In deciding disputes, evidence of essential facts is indispensable. Men see and hear and remember, but it is always possible that when they depose they do not say what they actually believe to be true. In earlier centuries, confidence in the ability of the judge to determine whether the testimony was true, by the application of tests now relied upon, did not exist to any great degree. Strongly believed however was, not merely that a personal Deity existed, but that he was so interested in the affairs of state, in judicial inquiries, that he would interpose in some way and indicate what was true and what was false, in the allegations of litigants. Blackstone gives an account of modes of trial involving miraculous interferences by the Deity, in order to certify to the investigator the truth or falsity of human testimony. One mode of trial was that by ordeal. By the fire ordeal, a party took into his hand a piece of red hot iron, weighing one, two, or three pounds, or he walked barefoot and blind-fold, over nine

red-hot ploughshares laid lengthwise at unequal distances. The possibility of escaping unhurt was very small. Actual escape from damage was deemed the result of a divine interposition, whose purpose was to declare the truth of the assertions of the thus aided party. If Providence did not interpose to avert the natural results of the experiment, he intended by so forbearing, to affirm the truth of the accusations against him. The ordeal then, was a mode of making God a witness to the veraciousness or falseness of the assertions of the party. As says Prof. Wigmore (3 Evidence p. 856) "The early Germanic modes of trial consisted largely in a reference, in one form or another, to the judicium Dei. By oaths formally taken, one might even establish his claim or his plea beyond attack. It was not a matter of weighing the credibility of a sworn statement. The thought was rather that such an appeal could not be falsely made with impunity. To such an invocation a judicial and determinative effect was attributed, by the religious notions of the time." God ratified the assertions of the party, by averting from him the consequences of his acts, done in the ordeal, which, without his intervention would have occurred. It was not thought that the willingness to undergo the ordeal with its dreadful risks, was a proof of the sincerety of the party, but it was believed that the result of the trial was a divine attestation of his veraciousness.

The mood of thought that God would interpose immediately and thus virtually affirm that the party was speaking truly, or otherwise, passed away. But our predecessors were not ready to relinquish altogether aids from Heaven in the ascertainment of the facts. If God did not interpose miraculously at once, in human contests, the common creed assigned to him the function of judging the world, and of rewarding the good and punishing the bad; in particular, those who testified falsely after calling on him to notice what they were saying. To invoke God's attention to the testimony one was delivering, and then

to perjure one's self, were an insolent defiance of the Almighty, which he would castigate with extreme and endless pain. It was necessary, in order to secure the maximum deterrence from falsehood, that the witness should be made to think of God, of the gravity of a violation of his prohibition of falsehood, of the dread results of incurring his anger. Hence, the use of the oath. It was a maxim of the law that no testimony could be considered unless delivered after oath[1]. When Pennsylvania was settled the Quakers who believed an oath forbidden by the Scriptures, found this rule irksome. The English parliament had exempted Quakers from the necessity of swearing and the Act of May 31st, 1718, after reciting that the greatest part of the inhabitants of this province cannot for conscience sake "take an oath in any case" enacted that in judicial investigations, witnesses and judges might qualify themselves according to their conscientious persuasion respectively, either by taking a corporal oath, or by the solemn affirmation allowed by act of parliament to those called Quakers in Great Britain," and that such affirmation should be deemed in law to have the full effect of an oath.

The Act of March 21st, 1772 recognized that a solemn affirmation by one having a "conscientious persuasion" of the wrongfulness of swearing, was a substitute for an oath. For those not having this persuasion, the act prescribed an "oath in the usual and common form, by laying the hand upon and kissing the book, or by lifting up the right hand and pronouncing or assenting to the following words: I A. B., do swear by Almighty God, the searcher of all hearts, that I will _____ and that as I shall answer to God, at the great day." This oath then, was an appeal to God to note that the witness was telling the truth. It reminds him that there is a great day of retribution somewhere in the future, and that, on that day he

[1]Rex. vs. Brasier, Crum. Cases Reserved, 1779; Wigmore's Cases, p. 144.

will be held responsible by God, for the falsity, if false it be, of his oath. The retribution in contemplation is plainly to begin at some time after death, at the "great day."[2]

The thoughts expected to be awakened by the oath may be seen in the words of that exemplary Judge, Jefferies, C. J., who threatening a refractory witness, said to him "Now mark what I say to you, friend; * * * Thou hast a precious immortal soul, and there is nothing in the world equal to it in value * * * * Consider that the Great God of Heaven and Earth, before whose tribunal thou, and we, and all persons are to stand at the last day, will call thee to an account for the rescinding his truth, and take vengeance on thee for every falsehood thou tellest. I charge thee therefore, as thou will answer it to the Great God, the judge of all the earth that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever * * * * for that God of Heaven may justly strike thee into eternal flames, and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth."[3] These and other eschatological views were supposed to fortify the will to tell the truth and to overcome the temptation to falsehood.

These views in the English-speaking world, following the leadership of German and French scholarship, have in the course of decades undergone a great modification. The churches have nearly eliminated anger and indignation from the conception of the Deity. Love, patience, long suffering are now almost his exclusive emotions. Eternal punishment, initiated by the assize of the Great Day, has disappeared from sermonic discourses. The special wickedness of falsehood, or of falsehood in public investigations, is not inculcated. The result is that the utility of the oath has largely disappeared. It appeals to

[2]Cf. Commonwealth vs. Winnemore, 2 Breush, 378; Cubbison vs. McCreary, 2 W. & S. 262; Blair vs. Seaver, 26 Pa. 274.

[3]Quoted from 3 Wigmore, p. 859.

fears and reverences that, once strong and deep, have passed away. It is still necessary to use the testimony of men, but the motive for truth, appealed to by Jefferies, C. J., is not operative in a sufficient number of minds to justify the retention of the oath as a necessary preliminary to the reception of testimony. The revolution in theological and eschatological opinions has, in Pennsylvania, found expression in recent legislation. The Act of April 23rd, 1909, (6 Pardon 7027) enacts that "hereafter the capacity of any person to testify in any judicial proceeding, shall be in no wise affected by his opinions on matters of religion." "No witness shall be questioned in any judicial proceeding concerning his religious belief, nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility. Hereafter the affirmation may be administered in any judicial proceeding instead of the oath, and shall have the same effect and consequences, and any witness who desires to affirm shall be permitted to do so." Under this statute, the testimony of the oathless man, the man that avows more or less distinctly that he delivers it without theological restraints, is to be treated as being as credible as that of one who feels and confesses these restraints. The statute is a symptom of a stupendous change in opinion about super-mundane things. It repudiates the notion that, if a man does not believe in a personal God, in his hatred of falsehood, in his purpose to punish endlessly, or even for a short time, those who testify falsely, he is rendered unworthy of belief.

The only fear that remains, after the abolishment of fear of God, is the fear of human punishment for false testimony. The danger of such punishment is so slight that many feel it to be neglibible. When the punishment came from God, there was no chance of escape. He knew; the state is often left in doubt. There was no obstacle able to defeat the will of God. Circumvention of the state, as punisher of false testimony, is easy and well nigh universal.

The disappearance of religious, or theological views as credentials, for witnesses, leads to a consideration of the subject of dying declarations. A declaration of a man, to be received as evidence, must usually be made after a formula which is supposed to give solemnity to his mind, and evoke a state in which the impulse to adhere to the truth shall be active and, possibly, controlling. The witness is the subject of observation of the judge, the jury, the by-standers; the persons specially interested in the issue, in which he is intervening. But, in homicide cases, the statement of the deceased, made anywhere, at the scene of the killing, in a hospital, in his home, made possibly to only one man, and he a friend, and therefore, a possible enemy of the accused, made in the act of dying, or possibly weeks before death, made not in the presence of the accused, made long after the assault which eventuates in death, may be used to convict of the homicide. What reason is assigned for so great a departure from the usual methods of proof?

It is urged that there is "a necessity to admit such proof on a par with an oath in a court of justice."[4] Says Wigmore,[5] "The requirements of this principle, as generally accepted in the beginning, were simple * * * The necessity thus lay simply in the death of the witness, and that was all that need be shown." The man that knew how he had been killed, could not be brought into court. Therefore bring to it a report of what he said. When a murder occurs it is quite desirable that the murderer should be punished. But it is at least equally desirable that no one be adjudged guilty and executed, unless he is in fact guilty. How so important a fact as guilt of murder, may be properly established by a form of evidence which in every other case, would be excluded as unworthy of credence it is somewhat hard to see. If the other evi-

[4]People vs. Craft, 148 N. Y. 631.
[5]3 Evidence, p. 161.

dence would sustain a verdict of guilty, the dying declaration is superfluous. Yet since in some, possibly many cases, there could be no conviction of the defendant without the dying declaration; such declaration may be used even where there is no necessity to use it.[6] It is odd, that a transfer of money, $10, $1.00 cannot be made, by proof of the assertion of a man, now dead, that the money is owed, but the conviction of a man of murder, and his execution, can be effected by such assertion. To accomplish the gravest of results, evidence is allowable that would not be permitted to effect any result of inferior seriousness.

Why can a declaration be thus received? Eyre, C. B. suggests[7] that it is admitted because made when the party is at the point of death; and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth. A situation so solemn and so awful is considered by the law (that is, by Baron Eyre) as creating an obligation equal to that which is created by a positive oath administered in a court of justice." Baron Eyre had never passed through the process of death. He could only imagine what would be his frame of mind, were he dying. But the actual frame of mind, when death came, would probably prove vastly different. In many, consciousness is very obtuse. Consecutive thought is impossible. The holding of a vast picture of God, heaven, hell, the sequence of hell to falsehood, etc., would be impossible. There are thousands of types of mind, and it would be absurd to infer, because Baron Eyre, in dying, would have such and such thoughts and emotions, that A, B, C, D, etc., would have the same. The psychology of the dying has not been explored and least of all by the speculators and dreamers who sometimes constitute the courts. Every hope of this world is gone, that is, for the dying.

[6]Commonwealth vs. Roddy, 184 Pa. 274.
[7]Woodcock's Case; 3 Wigmore, Evidence, p. 168.

But, he may hope for the living, for his enemies as for his friends. He will make a will for the future benefit of some, or to prevent a benefit to others. It cannot be doubted that men of vindictive natures often carry hatred with them to the last gasp; nor that they think of their reputations after death, and have a desire to protect them from depreciation. Gray, J. well observes[8] "It is **assumed** that, being made in extremity * * * they have some guaranty for their truth, in view of the solemnity of the occasion, or as much so as an oath in court would have. But it is clear that their value as evidence rests upon an **assumption.**" The "solemnity of the occasion" is referred to by judges. But, the occasion is solemn to the by-standers, the parents, the children, the friends, but it is probably seldom that it is solemn to the dying subject. Through various stages of obtuseness of feeling, and dimness of thinking, he passes into total unconsciousness. That transit is solemn to the observer, the clergymen, the poet, the ordinary man, who, when well, shrinks from death, but it does not follow that the departing man has any deep sentiment of solemnity.

The real defect of "dying declarations" in murder cases is not that they are not sworn. No evidence at present, needs in this state, to be sworn. An affirmation suffices. Nor is it that they are not made in response to a formula administered in court. Such formulae exercise, if any, the slightest influence on the witness's effort to remember the facts, or his anxiety to speak the truth. The objection, a very serious one, is that the dying statement is often fragmentary. It is not supplemented by a cross-examination which the acccused party, had he been present, might have made. The possible errors of the statement thus escape exposure. Alderson, Baron,[8] concedes that "though the sanction (i. e. of dying declarations and testimony in court) is the same, the opportunity of investigating the

[8]People vs. Croft, 148 N. Y. 631.

truth is very different," and Gray J.,[9] puts emphasis on the same consideration, on the absence of the declarant from the view of the jury, and on the inability of the defendant to cross-examine him. "Where the life or the liberty of the defendant is at stake," he observes, "the absence of the opportunity for cross-examination is a serious deprivation, which differentiates in nature and in degree the evidence of a dying declaration from that which is direct and given upon the witness stand."

It is evident that the courts ventured on the policy of admitting dying declarations because they assumed that the declarant entertained the same theological conceptions as were supposed to make the oath causative of truthfulness. But the state has officially ceased to have these conceptions or to believe that they appreciably fortify the will to speak the truth. But, if they are inert, in the case of the living, how are they to be believed efficient, in the case of the dying? The changed aspects of the universe that have abolished the divine sanction for the living man's veracity, will probably some day abolish it for the dying man's veracity. The policy of the Massachusetts statute, "No declaration of a deceased person shall be excluded as evidence, on the ground of its being hearsay, if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." (Wigmore Cases, p 626) may prove contagious. The declarations of those who have since died will be admissible, not in homicide cases only but in all cases, and not because of any unverifiable assumptions as to the effect of the nearness of death on the tendency to falsify. But the impossibility of cross-examination will be a weighty objection.

[9]Ashton's Case, 2 Lewis Crim. C. 147; 3 Wigmore, Evidence, p. 168.

[10]People vs. Croft, 148 N. Y. 631; 3 Wigmore, p. 168.

PURCHASEABILITY OF EXPERT TESTIMONY

A city widened a street, to the alleged detriment of a land-owner. Viewers were appointed to assess the damages. The owner had had in his employ A. and B., "real estate men," in a more or less confidential relation. Finding that their estimate of his damages from the street-widening, was not as great as his own, he abstained from calling them as witnesses. But, for this reason the city, the defendant, called them. Objection by the plaintiff, to their testifying adversely to him, because of their relation to him, was sustained by the court. They were unwilling to testify against their employer. On appeal, the final court declined to consider whether the trial court's reason for excluding them was good. They were unwilling witnesses. They were called to give an opinion, as "real estate men," as experts. Could an expert be compelled to testify as such?

Testifying is not usually, a voluntary act. Any one knowing a pertinent fact, may be obliged to come into court and testify concerning it. His duty reposes on no bargain between him and the party that wants his testimony. Certain compensations have been prescribed, not determinable by the value of the evidence, but rather by the loss to the witness, from his going to the place of trial, remaining thereat, and returning from it. The witness cannot say, my testimony will be worth to you $1000, because it will win for you a verdict of $5000. I am a virtual partner with you in the litigation. Without me, it would be wholly unproductive. Why then, should I not have 20 per cent. of what you gain?

Certain compensations, not varying with the nature of the suit, or the value of the expected testimony, or the size of the anticipated recovery have been adopted by court or legislature. If prepayment of a fee is required, at the serving of the subpoena, its size will be discoverable, not depending on the caprice of the witness. One

witness might find his time more valuable than an equal time of another. He may, in his ordinary business obtain a compensation, five, ten, twenty times as great as that of another. But inquiries into the different values to witnesses, of certain quantities of time, are not made. The act of June 1st, 1907, illustrates the policy with respect to witnesses. "The pay of witnesses shall be one dollar and fifty cents **per diem,** together with mileage as is now provided for by law;" Purd. Dig. p. 6165. The day's service of the humblest person, that of a child, woman, valetudinarian, who are earning nothing; that of a farm hand, who earns a dollar or two a day; that of a professional man, whose days are worth to him $100, are appraised alike.

In civil cases, since the statute of Elizabeth the compensation to which the witness is by law entitled must be tendered to him in advance, at the time of serving the subpoena. "In lack of this, the witness is not compellable to testify" says 4 Wigmore p. 674, although that author terms the requirement of prepayment "unwholesome," a "mere relic of the period when the State did not even pay the salaries of its judges, but expected the parties to bear all the expense of the State's doing justice." But the compensation to be tendered is not fixed by the will of the witness. Wigmore's objections to requiring payment at the service of the subpoena are, it tends to create the notion, (a) that the witness' duty runs to the parties, and not to the community; (b) that he is rendering his service for money to the party that desires it; (c) it tends to intensify the unwholesome partisan spirit of witnesses, and to put them in the position of paid retainers. It lowers the moral level of the litigation, (d). It places an unequal burden on litigants, according as they are more or less able in advance, to furnish the money for witness fees. "A poor man is entitled without advances, to the testimony of the witness to defend him from injustice or to aid the enforcement of a right, just as if defendant in a criminal case, he is entitled to the testimony of those

who can vindicate him." 4 Wigmore, p. 678.

A witness may be called to testify to facts which have occurred under his own observation, which he has seen, or heard, or felt, or otherwise perceived by means of some corporeal sense. The law also allows what is termed opinion evidence. Decisive matters are not simply facts, but also relations between facts; e. g. the relation of cause and effect. The relation is not seen by the eye or touched by the hand, but is inferred for sundry reasons which are valid to the man of experience, the expert. The witness is asked "his opinion drawing from the facts such inferences as are receivable only from persons specially qualified by experience or study." 4 Wigmore, p. 680.

A blow has been followed by death. Was it the cause of the death? Witness A proves the blow, and within a short time thereafter, the death. But he cannot say that the death was the result of the blow. A physician, who did not see the blow, may express the opinion that, if given, and the death followed, it was the cause of the death. His observation or study has made him aware that in a percentage of cases of similar blows death has followed. The frequency of the sequence is a ground for inferring causation. An accident has induced the calling in of a surgeon, whose treatment is alleged to have been unskilful and negligent. A permanent lameness has resulted. One who did not see the patient, may hear a description of what was done by the surgeon, and may compare that with what he conceives to have been demanded by the case, and may say that it was careless or unskilful. He has a standard gradually formed by past experience and study. With this standard he compares the history of the actual treatment. In a large class of cases, opinion evidence is indispensable, and only a comparatively small number of men are able to form a useful and acceptable opinion. Can the opinions of these men as witnesses be commanded, as the factual testimony of other witnesses? Fact alone is insufficient. Opinion without fact, is irrele-

vant. The confluence of the two is necessary, for the evolution of a judgment or a decision. Why then, should there be any difference in legal accessibility of the two sorts of witnesses? The fact witness did not see or hear, in order to prove. That does not excuse him. The opinion witness has not accumulated the faculty of forming it, for the purpose of testifying. It happens that, without view to testimony, both have acquired a capacity to contribute a consideration determinative of the guilt or innocence; the civil right or obligation, of a man. Should not witnesses of either sort be equally commandable?

At the top of Mt. Blanc, occur an assault and battery. X happens to be there. His getting there cost him days of effort and $1000. But, if he saw the assault, he would be obliged to testify even in a civil case and without other than the ordinary pay of witnesses. If what he saw, was not a fatal injury, but an assault for which compensation in money was sought, should he be paid a fee that was estimated by a consideration of the expense undergone in reaching the place where the assault occurred? Repayment of the cost of the attainment of the power to see and hear the participants in the fight, would not be required, in order to secure the testimony. An expert hears the details of a case, and is asked his opinion whether the death of the deceased was the result of a poison; whether a specified treatment of a sick man was the proper one. His ability to form a valuable opinion has been gradually acquired by study, reflection, discussion, experimentation. But it was not acquired in order to be used in the present case. The fact witness' ability to see or hear, may have cost time and money; but he cannot insist on recoupment before testifying. Why should the other, the expert witness, insist on such recoupment for the expense of his acquisition of the power, the power to form an opinion? The fact is that every witness to facts, is an expert in regard to those facts. He has abilities that the ordinary man does not have. He was there where and when the

occurrence took place. But few human beings were so placed. But a money value is not to be put on his unique faculty of observing, in order to command his testimony. What were the causes of his being where the event occurred is not considered in determining either his duty to testify, or the compensation he shall receive for testifying.

It has been suggested that "the private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things. In each case, it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained." But the expert, when stating an opinion, does not give up anything, material or immaterial. He has as much skill and experience after his testimony as before. What he has done is, not to part with any thing, but to exert the power of articulation and expression, in conveyance to other minds of knowledge of the state of his own mind. He has not lost any past effort, or the results of any past efforts in the knowledges and capacities for perceiving relations. He has simply expended words in disclosing to the jury the opinions within his consciousness. The same is true of the factual witness. He knew a fact. When he disclosed it, he did not part with knowledge of it, or with the faculties he used in getting knowledge of it. He parted with nothing. He used the power of expression to reveal his memory. The expert uses it to reveal his inferences. In both cases what has happened is that the veil is rent that hides from the juror's minds, what is in the mind of the witness.

If the state properly compels a man to appear in court, and to let the jury know what he saw or heard, unpleasant as that revelation may be to him, why is it improper to compel another revelation of an existing state of mind, that of an opinion? The past perception of a fact, the present memory of that past perception, are the property of the witness. They are not taken from him. He is

obliged simply to reveal their existence to others. The past sights, sounds, reflections on them, experiments with them, have generated opinions of cause, effect, care, negligence, etc., in the mind of the expert. He is not required to surrender them. He surrenders simply their non-discovery by others.

The state compels witnesses to testify, even expert witnesses, for or against defendants in criminal prosecutions. But, it ought to feel as much repugnance to an unjust defeat of a just civil claim, or the unjust maintenance of a civil claim. In both cases it, by its courts, is the agent that secures the right, or, if the judgment is unjust, does the wrong. The distinction between civil and criminal, in deciding on the duty of the state to do justice, seems artificial and irrelevant. The feeling that constrains the state to avert injustice in a prosecution, ought to constrain it to do justice and to adopt the policy that conduces to the doing of justice, in a civil case. If to save a man from six months imprisonment, an expert may be compelled to testify, so should he be, if his testimony may save a poor man from the unjust recovery of a judgment for $1000, or the unjust defeat of a suit for that amount.

The "common weal" is interested in the doing of justice in each particular case, not depending on number of cases, amount of injustice involved; dignity of the persons to be affected. The state is under a moral duty, if such there be for a political aggregation, to do justice, by compulsion, if unavoidable, of the necessary evidence from those who possess it.

It is suspected, and with reason, that experts are not called except when their testimony is going to be favorable to the party calling them. It is easy to glide into the suspicion that there has been a bargain, not simply to testify, but to testify for the other party to the bargain. If the courts promulgate the principle that expert evidence in civil cases can be secured only by a bargain, the policy of receiving such testimony is condemned. To appraise the

value of it, the size of the price paid for it would have to be known. Jurors may well doubt the worth of a physician's or a psychiatrist's testimony, when they recall that it has been bought, and, probably, at a prodigious price. The expert witness' declaration of opinion should have no more weight than that of the paid advocate, for like the advocate he is simply an agent paid to win what is termed success.

MOOT COURT

GARDNER VS. IVES

Contracts of Hiring—Hiring at Will—Presumption from Rate of Compensation—Presumption from Non-Mention of Definite Term—80 Super. 578 and 248 Pa. 471 Cited.

STATEMENT OF FACTS

Gardner was orally employed by Ives as a book keeper, at a salary of $2500 per year. He continued for the space of sixteen months, when without previous notice he was discharged. The salary was promptly paid at the end of each month. The plaintiff alleges that his employment being from year to year inasmuch as he had entered in the second year, he was entitled to employment and compensation for the whole of the second year, that is, $1666.66. The court directed a verdict for defendant. Appeal.

Anschelewitz, for Plaintiff.

Miss Graff, for Defendant.

OPINION OF THE COURT

Cherry, J. The vital question in the case at bar is, Did the plaintiff have a contract of hiring from year to year or merely one at will? If the hiring was from year to year the plaintiff is entitled to recover the full amount of his claim, 36 Pa. 367; 29 Pa. 184. If the hiring was merely one at will the plaintiff has no cause of action, 80 Sup. 578; 248 Pa. 472.

In 80 Sup. 589, the facts are analagous to those of this case and the law established there and reiterated in 223 Pa. 160 and 248 Pa. 472, is: "In a contract of hiring where no definite period is expressed the law will presume a hiring at will in absence of facts or circumstances showing a different intention and the fact that the hiring was at so much per week or month or year will raise no presumption that the hiring was for such a period. Where, however, a contrary intention can be fairly derived from the contract itself the law will allow such intention to prevail."

Accordingly, it is encumbent upon the plaintiff to show by evidence or implications fairly derived from the contract itself that there was a hiring for a definite period of a year. The burden of

proof rests with the plaintiff, 46 Pa. 434; 46 Pa. 426. In the opinion of the court he has failed to meet this burden and the defendant can rest his case upon the prima facie presumption that the hiring was one at will, 229 Pa. 169; 248 Pa. 472; 80 Pa. 578.

The only foundation for the plaintiff's claim is the fact that he was hired as a book keeper at $2500 per year. There is nothing in the facts to show that the hiring was for a definite period of time. The plaintiff cites the case of Hassenfus vs. Philadelphia Packing Co., 15 C. C. 650, wherein the court says: "Employment by the year at a yearly salary is not changed to a monthly hiring because payments of the salary are made monthly." But this assumes the existence of a contract from year to year as there was in this case.

The cases in which the Pennsylvania courts have derived from the contract itself an intention to create a hiring for a definite period of time have been few in number and type, and none of them justify the court in conjuring up such an intention from the meagre facts before it.

In 63 Pa. 79 the plaintiff agreed to become a salesman for the defendant at a salary payable quarterly. The court construed the word to imply a year to year contract. An extension of this doctrine to the case at bar where the only differentiating fact is that payment was made monthly rather than quarterly would bring Pennsylvania in line with New Jersey, Wisconsin, California and other states which hold that the mode of payment is indicative of the period of service. 34 N. J. 343; 94 Wis. 554; 69 N. W. 362 and the California Civil Code.

In Pennsylvania the policy of the courts seems to be to protect the employer in exercising a maximum of control over the hiring of help. To extend this doctrine of 63 Pa. 79 would seriously curtail this freedom and work a great hardship upon employers generally in the hiring of help. However this may be, if the change is desired it must come through legislative action and not through judicial construction. This doctrine is too well established to be subject to judicial impairment.

In 167 Pa. 275, a hiring was held to be from year to year by considering the context of correspondence between the parties. The real theory of this case however was that the text of the letters proved sufficient evidence to overcome the presumption that the hiring was one at will.

In 15 C. C. 650, the plaintiff was hired until the completion of certain work but this was in addition to other duties under an acknowledged year to year contract and his recovery was based upon this contract.

The plaintiff assigns as error the action of the learned judge in the court below in directing a verdict for the defendant. In our opinion the plaintiff failed to make out a cause of action and the lower court did not err.

In Haldeman vs. Read Machinery Co., 80 Sup. 578, which was quoted above as being analagous to the facts of this case, the court held; "There is an absence of facts and circumstances which might show a different intention and therefore the defendant's motion for binding instructions should have prevailed."

Weiderman vs. The United Cigar Stores Co., 223 Pa. 160, cites with approval 6 Encyc. of Pleading and Practice, 161, which reads: "If the plaintiff relies upon an exception to the general rule he must state the facts in the complaint which bring his case within it." This the plaintiff has obviously failed to do.

The plaintiff cites 166 Pa. 203, and 269 Pa. 273.

In 166 Pa. 203, the issue was not as to the existence of a contract of hiring for a definite time but as to whether or not the plaintiff servant had so conducted himself as to merit dismissal. The court properly held that this was a question of fact for the jury.

In 269 Pa. 273, the employer admitted that there was some compensation due the servant. The court ruled: "a case by an employee against his employer cannot be taken from the jury where it is admitted that in any event a portion of the salary was due." In the case at bar the plaintiff had been paid for all work actually done and the sole question was as to the existence of a contract of hiring for a definite period of time.

The case of Hogle vs. De Long Hook and Eye Co., 248 Pa. 472, rules the case at bar in all the points of law that have been discussed. The holding of this case is that "in an action to recover salary for the balance of a year for which the plaintiff alleges that he had been employed but before the expiration of which he had been dismissed, where there were no facts alleged in the statement of claim from which the inference could be drawn that the plaintiff had been employed for the year which he claimed salary other than the fact that he was employed at a yearly salary, the presumption that a hiring at will was intended applied and the court properly entered judgment for the defendant on demurrer to the plaintiff's claim. The action of the lower court is affirmed.

OPINION OF SUPREME COURT

The plaintiff alleges dismissal from employment, before the time at which his employer, the defendant, had a right to dismiss him.

There was no explicit provision in the contract concerning the duration of the employment. Whether it was for a month or a quarter year, or a year, or two years, is not mentioned. The compensation was fixed at $2500 per year, but this is not deemed an implied or express agreement that the plaintiff shall be employed for a year. So long as he should be employed his pay was to be at the rate of $2500 for 12 months, but there was no stipulation that the plaintiff should be employed at least a year or, if employed more than a year that his right to continue in the service should last through the whole of a second year. This is the doctrine of Haldeman vs. Read Machinery Co., 80 Super. 578; Hogle vs. DeLong Hook and Eye Co., 248 Pa. 471.

The learned court below has examined a number of authorities and correctly interpreted them.

It might have been better, the silence of the parties leaving undetermined the duration of the employment, to adopt the principle, that when an annual or semi-annual, or monthly rate of compensation was stipulated for, the period measuring the compensation should be deemed the period of the employment. A suggestion by the learned court below, of a preference of the employer over the employee, arising out of the importance of preserving to the former, the power of control over his business, may be well founded, but, whatever the reason for the rule, the rule must be respected.

The judgment of the learned court below is affirmed.

HINKLE VS. SMALLEY

Sheriff's Interpleader—Filing of Bond—Amendment of Statement of Claim to Reduce Bond—Surrender of Property—Liability of Claimant on Bond—64 Super. 474 Approved.

STATEMENT OF FACTS

Smalley obtained judgment for $1000 against X, and levied upon two automobiles of X. Hinkle claimed that the vehicles were his. The sheriff caused an interpleader. Under the Act of May 26, 1897, P. L. 95, Hinkle filed a bond claiming both automobiles. At the trial of the issue Hinkle disavowed ownership of one of them and attempted to amend his statement of claim. The court refused to this. The decision on the interpleader was that both belonged to X. Smalley then sued Hinkle on the bond and recovered the amount of his debt against X, although the value of the automobile which was undoubtedly X's was only $400.

Embery, for Plaintiff.
Hoffman, for Defendant.

OPINION OF THE COURT

Ingram, J. The question for this court to decide is whether or not Hinkle should have been allowed to amend his statement of claim or not, as the plaintiff has contended, to fix Hinkle's liability on the bond. Hinkle's liability will depend upon the amount of the bond filed. The amount of bond filed is fixed by law as twice the value of the goods claimed, if the judgment is greater than the value of the goods, but if for a less sum, then double the amount of the judgment, 7 Dist. Rep. 277.

Neither the Sheriff's Interpleader Act of May 26, 1897, P. L. 95, nor the supplements and amendments thereto of 1919 and 1923 make any provision for amendments to statements of claim. It would violate the general rule of amendments not to allow an amendment when it does not prejudice the opposite party.

Under the general law of amendments and the Pa. Practice Act a party will be allowed generally to correct inaccuracies or supply omissions in his pleadings by amendments at any time before the jury have retired, if he has not been guilty of laches in applying for leave to amend, and if the amendment does not change the form of action, or introduce a new cause of action or grounds of defense, or prejudice the adverse party. Such amendments shall be allowed as may be necessary for the purpose of determining the real question or questions in controversy between the parties, and administering justice. And subject to the rights of opposite party, amendments can be made at any time before the jury have retired, 1 Amer. and Eng. Enc. of Law 533; Herman vs. Recher 160 Pa. 121. Amendments may be made to a statement under The Sheriff's Interpleader Act, the issue remaining the same; Tredon vs. Zurfuss 5 Del. 129; and the statement may be amended at any time during trial, providing there is no change in the cause of action.

The allowance or refusal of an amendment is largely within the sound discretion of the trial court, subject to certain rules of that court, 172 Pa. 323. The court however must exercise its sound legal discretion, and not its arbitrary will. The question of advisability is a question of fact to be determined by that court, and the determination will be reviewed only in case the court abuses its discretion. There is no abuse of the discretion of the court in allowing an amendment when parties are not prejudiced, 21 Cyc. 370; Krile vs. Ege. 82 Pa. 102. And where the gist of the action remains the same, the court has the right to permit the plaintiff to withdraw

his original declaration or statement of claim, and file an amended one, 7 Atl. 146.

Certainly here the gist of the action remains the same, and we cannot see any way in which the opposite party would be prejudiced. For if the amendment of statement of claim should be allowed, the judgment creditor has equivalent security out of which to obtain satisfaction of his judgment. He still has the one automobile levied upon, ownership of which is disclaimed by Hinkle, and also the bond Hinkle must file to obtain the automobile, title to which he is attempting to maintain. Thus, if the value of the two cars in the hands of the original claimant X would have satisfied the judgment, the one car remaining unclaimed and the bond filed by Hinkle, which would take the place of the other car, would certainly accomplish the same purpose.

So Smalley can proceed against the unclaimed auto, and also against Hinkle's bond, (if Hinkle fails to maintain his title to car claimed).

And as this amendment would not have changed the cause of action, or prejudiced the opposite party, then, according to Smith vs. Bellous 77 Pa. 441, it should have been allowed.

The amount of damages is not such as we are led to believe from the argument of the defendant, the full amount of the bond, but is aptly interpreted by Judge Orlady in Reger vs. Brass Co., 6 Super. 375. He says, "The true measure of damages in a proceeding on a forthcoming claim property bond, given under the Sheriff's Interpleader proceedings, where, on determination of issue against claimant the goods have not been returned, and the bond has thereby become forfeited, is the value of the goods. In Bricker vs. Doyle, 64 Super. 474 and Sect. 3 of Interpleader Act May 26, 1897, P. L. 95, the statement that "Suits may be brought thereon to the use of such persons until the amount thereof is exhausted" is interpreted to mean only the amount of liability on the bond. This is never the full amount of the bond, but the appraised value of the goods if the judgment is greater, or the amount of the judgment if that be less than the value of the goods, plus costs.

In view of the authorities stated above we are of the opinion that the lower court erred in not allowing the plaintiff to amend his statement of claim.

OPINION OF SUPREME COURT

Smalley's execution was intercepted by the Hinkle claim of ownership of the two automobiles. This led to the interpleader. He persisted and filed a bond claiming both. After thus retarding the process of execution for some weeks or months, possibly, Hinkle

discovers that one of the automobiles was not his. Why he did not discover this before is not disclosed. He now wants to reduce the liability on the bond, by having it lessened by the amount of the value of the automobile, ownership of which he is now disavowing, The value of the auto which was conceded to be X's was only $400.

The doctrine of Bricker vs. Doyle, 64 Super. 474, is that one who claims adversely to the defendant in the execution and who gives a bond, cannot discharge it by surrendering the thing claimed. Both the automobiles are found to belong to X and Smalley had a right to sell them in execution. Of this right he has been deprived and he has been compelled by the law to have recourse to the bond furnished by Hinkle. He cannot now be compelled to abandon a claim on the bond and resort to the automobiles by another execution.

We are obliged to dissent from the judgment of the learned court below, supported through it is by an ingenious argument well stated.

Reversed.

HUME'S ESTATE

Trusts and Trustees—Principal and Income—Rights of Life Tenant and Remainderman to Additional Shares of Stock—Division of Proceeds of Sale of Right—74 Super. 373 Cited.

STATEMENT OF FACTS

Hume owned twenty shares of stock in the X Co., which for years had declared dividends of ten per cent. His will gave to his son William the stock for his life and at his death to his brother John. Five years after Hume's death, the company issued additional stock at the price of $100 per share, one share to every existing stockholder for each share held by him. A trustee had been appointed to hold the bequeathed shares during William's life. This trustee had no trust funds with which to buy additional shares. He therefore sold the right to subscribe for 20 shares for $250. This is a petition by William to compel the trustee to pay over to him the $250. The trustee held that the $250 was a part of the corpus to be retained by him till William's death and then paid over to John.

Gunnett, for Plaintiff.

Mitchell, for Defendant.

OPINION OF THE COURT

Hoffman, J. The troublesome question as to whom is entitled to extraordinary dividends declared upon stock held in trust as be-

tween life beneficiaries under the trust and the remainderman has been considered by the courts in this and other states in many and various forms from time to time. Decisions that are apparently contradictory have been caused in part by different facts and circumstances existing in the cases decided, and the effect necessarily given to the language of the instrument creating the trust in the particular cases in which the decisions have been rendered.

In determining who is entitled to the extraordinary dividend upon stock held in trust, the intention of the testator or maker of the trust must be carried out when such intent is clear, so far as such intent does not result in an unlawful accumulation of income. It is apparent from the case before us that the maker of the trust had not considered the possibility of extraordinary dividends being declared by the corporation to effectuate their reorganization or in the division of the accumulated profits made necessary by new laws or changed circumstances; or, if the maker of the trust had considered such possibility, he failed to express himself in the instrument creating the trust so as to show any clear intention regarding the same.

The courts in this country in their efforts to formulate an equitable and workable rule have evolved four rules which are well supported. They are the Kentucky rule, the Massachusetts rule, the American rule, and the Pennsylvania rule. It is not our purpose to analyze or attempt to reconcile the decisions of other jurisdictions or to refer to them except as we must herein to illustrate the extent of the conflict regarding the question now considered.

This question must be approached from an interpretation of the will, and thereafter, and only if necessary, from an inquiry as to the source of the dividends in question.

In Pennsylvania the rule is that interest, income, and profits, standing alone, exclude the life tenant from the extraordinary dividends which decrease the corpus. In Bayer's Appeal, 224 Pa. 144-153, our Supreme court, speaking through Mr. Justice Potter, said: "And then, after all, the rule for the determination of controversies over dividends, between life tenants and remaindermen, should be to give to each just what the donor intended each to have. As has been said, the intent of the grantor is the pole star for the guidance of the courts."

Unless otherwise appearing, presumptively the grantor intended every dividend should go to the beneficial holder of the shares at the time it was declared. This will carry every dividend presumptively to the life tenant instead of to the remainderman. See Thompson on Corporations, sec. 2193.

The first case in which the Pennsylvania rule, in its essential feature of apportionment, was clearly announced was Earp's Appeal, 28 Pa. 369. The court instead of awarding the entire dividend to the corpus, or remainderman, held that it should be apportioned between them; in other words between income and corpus. The Pennsylvania rule is thus stated in Smith's Estate, 140 Pa. 344; "It is well settled in this state that when the stock of a corporation, is by the will of a decedent given in trust, the income thereof for the use of a beneficiary for life, with remainder over, the surplus profits which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the corpus of his estate; while the dividends of earning made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash, or scrip, or stock,"—quoted with approval in Sloan's Estate, 258 Pa. 368.

In Boyer's Appeal supra, the court said that the burden was upon those who claimed in remainder to show that the dividend obligations decreased the value of the stock below what it was worth when the trust was created, and, failing to do this, the whole of the bonus dividend would, under the operation of the Pennsylvania rule, go to the life tenant, altho that rule recognizes that dividends from earnings before the creation of the trust belong to the corpus, and that dividends from earnings which accumulated partly before and after the creation of the trust are to be apportioned.

The court in McKeown's Estate, 263 Pa. 78, cites with approval Boyer's Appeal supra and further says: "An extraordinary corporate dividend is presumptively payable to the party entitled to the income at the time the dividend was declared; but this presumption must yield to proof of the fact, and, if it appears that by such dividend the corporate assets are reduced below their value at the time the trust began, the principal must first be made good before anything is awarded to income." The apportionment contemplated by the rule is not a division of the extraordinary dividend between corpus and income in the proportion of the surplus or undivided earnings of the corporation before and after commencement of the life interest, but merely the compensation of the corpus for the loss in consequence of the dividend, whether stock or cash, in the book or intrinsic value of the original shares as of the date of the commencement of the life interest.

In Robert's Estate, 2 D. & C. 667, also in Waterman's Estate, 3 D. & C. 422, it is held a gift for life of issues and profits of testator's interest in the stock of a particular corporation is a gift in specie, and extraordinary dividends declared after testator's death from earnings made in his lifetime pass thereunder to the life tenant. In

these two cases it was apparent that the dividends would deplete the assets of the company as they existed at the creation of the trust. The court concedes that all dividends declared out of earnings since the death of the testator are payable to the life tenant and recognizes that the earnings out of which the present dividend was declared were mostly accumulated during the life of the testator but in the face of it, it attempts no apportionment but give the entire dividend to the life tenant.

We feel the court in Waterman's Estate, supra, has gone beyond the original Pennsylvania rule and has applied in fact, though not by name, the American rule, that it,—"All net earnings, howsoever they may have been treated or used by the corporation during their accumulation, and regardless of the period during which they have accumulated, if declared as dividends out of net profits during the life tenancy, are given to the life tenant, whether such dividends are made in cash or capital, provided that the principal of the trust fund is not diminished thereby," see 24 A. L. R. 39. This rule we feel does away with the apportionment feature of the original Pennsylvania rule which has been found troublesome, and often incapable of satisfactory enforcement. Moreover the original Penna. rule is objectionable because it involves an investigation of the business of the company, and a determination of the question sometimes by the court upon insufficient evidence. This has led some courts to assume that the net earnings were made during the existence of the trust, in the absence of satisfactory evidence to the contrary, because the law presumes they were made at the time the dividend was declared; but many others have repudiated the apportionment feature entirely, giving to the life tenant all net earnings declared as dividends during the existence of the trust, no matter when made, and to the remainderman all such earnings, if not declared as dividends until after the life estate ended.

In the case at bar we feel constrained from the standpoint of justice to the parties, and to give effect to the intention of the testator, to apply the modified Pennsylvania rule or American rule as it is more generally known. In the absence of any evidence whatever that the issue of the dividends decreased the value of the stock below what it was at the time of the creation of the trust, the burden is upon the remainderman to show such decrease, Boyer's Appeal, supra. Therefore it can be assumed on the facts before us that no such decrease occurred. The stock dividend was declared during the life tenancy, and whether in cash or stock, we are of the opinion that they should go to the life tenant.

The petition of the life tenant is granted.

OPINION OF SUPREME COURT

The additional shares of stock were not a dividend. They were offered to the existing shareholders, but, at the price of $100 per share. If any remained untaken by the stockholders, they might be sold to non-stockholders at $100 per share. The past history of the corporation indicated that it had a profitable business. It had been paying dividends of 10 per cent. This circumstance would tend to induce non-stockholders to subscribe, and even to pay a sum of money to the stockholder who declined to subscribe, for an assignment of his right. The trustee, not having the money with which to pay for additional shares at $100 a share, has transferred the right to subscribe, for $12.50 per share; for the 20 shares $250.

What does this represent? Plainly the value of a right to subscribe at $100 a share. Whose right was this? Plainly not the right of William, nor of John, but the right of the two. The right was incident to the stock bequeathed to them. We think the price obtained for it must be distributed as the stock is distributed, a life estate in it going to William and the remainder to John. The trustee will receive it, invest it, and pay to William annually, the interest obtained upon it, plus the dividends on the stock in his control; and after William's death, pay the $250 to John and transfer the shares of stock to him.

There are several decisions on some of the questions suggested by this case. We content ourselves with citing, Veech's Estate 74 Super. 373; Biddle's Appeal, 99 Pa. 278; Moss' Appeal 83 Pa. 264.

The opinion of the learned court below discloses diligence in the investigation of the decisions. We are obliged, however, to sustain the appeal.

Decree reversed, and payment of the $250 to the trustee is ordered.

ABBOTT VS. CITY OF WILKES-BARRE

Street Improvements—Assessment of Damages—Benefits As Off-Set to Damages—Foot-front Rule—Act May 15, 1913, P. L. 215—80 Super. 590 Approved.

STATEMENT OF FACTS

The city improved a street on which was the house and lot of Abbott. The grade of the street was reduced so that the entrance to the house of Abbott was seven feet above the level of the street. Abbott claims damages. The viewers found the damages $1,000. In

estimating the benefits they considered only such as were peculiar to Abbott's house, not such as were common to the houses on that street along the improvement. Benefit was found to be only $50, The damages allowed the plaintiff were $950. It was proved that the improvement increased the selling value of all houses along it 50%. The city appeals.

Barr, for Plaintiff.

Dilley, for Defendant.

OPINION OF THE COURT

Clarke, J. The question upon which this case hinges is this, "Are the benefits derived from the improvements to be considered only as those peculiar to Abbott's house, or are the benefits common to the houses on the street where the improvement was made, to be considered to set-off the amount of damages caused."

In my opinion the former contention is the correct one; namely, that the benefits derived from the improvements are to be considered only as those peculiar to Abbott's house. The reviewers, after viewing the property of the plaintiff, fixed the damages at $1000; which is accepted by both counsel for plaintiff and defendant as a fair and adequate compensation.

The reviewers then estimated the value of the improvement to the plaintiff's property by considering the special or peculiar advantage that the plaintiff gained, and found it to be $50.

In determining the damages, the plaintiff is entitled to have his property considered as a whole, distinct, and separate matter, and is not bound to have a set-off of damages which has been arrived at by considering the value of the improvements to all the houses along the street. Were the court to allow a set-off to be computed in this manner a great injustice would be done. Suppose there are twenty houses along a street, and the plaintiff is the only one who has beautified and attempted to improve his property, while the other house owners, either through carelessness or neglect have let their property go to pieces and decay. Should the court make the citizen who is a credit to his city and country, suffer loss by allowing the value of improvements to all, which undoubtedly would be more valuable to the other property owners, to be set off against the damages caused to his property?

In Pennsylvania the precedent of the courts has been that only special benefits shall be considered. These may be set off against the damages incurred. The general rule is that the measure of damages is the difference between value before and after improvement,

but this does not permit the consideration of any general benefits. 51 Pa. 87; 110 Pa. 436; 112 Pa. 56; 141 Pa. 1.

In 126 Pa. 143 the court following established precedent states that property in the neighborhood is not to be considered in establishing the peculiar benefits to the property of the plaintiff.

In 64 Super. 576, and 166 Pa. 241, the courts held that the defendant could not set off subsequent increase in value of property common to the entire neighborhood brought about or produced by the improvement. This precedent I do not feel justified in overruling, as great injustice would result, and the difficulty in estimating the value of increase would be a matter of constant litigation in the courts.

In 266 Pa. 586 the court held that the abutting owner was not to be charged with general indefinite appreciations in value of property in the neighborhood as distinguished from special benefits to his and abutting properties resulting from improvements. 80 Super. 590 is to the same effect.

A case cited by counsel for the plaintiff which is on all fours with the case before me is: Manning vs. City of Shreveport, La., 44 Southern Rep. p. 882, which holds that only peculiar benefits to the plaintiff's property are to be allowed as a set-off against the damages awarded the plaintiff.

All through the long line of Pennsylvania cases cited by the counsel for the plaintiff, the tendency has been to allow only improvements, special or peculiar to be set off against the damages awarded.

The words special and peculiar are used interchangably by the courts, and are used to distinguish the method of computing the value of improvement. Both words are synonymous and relate solely to improvements that benefit the plaintiff's property.

Therefore: in view of the long line of cases and precedent established, I affirm the decision of the lower court which was in favor of the plaintiff.

OPINION OF SUPREME COURT

We are unable to reach the conclusion at which the learned court below has arrived.

The improvement in the street has in some respects been injurious and in others, beneficial to the plaintiff's property. If his property was previously worth $6000, its value has been increased to the extent of $3000, 50 per cent of the value, if we omit consideration of the effect of its elevation along the street. The effect of that is

a diminution of value by $1000. It would result that there would be a gain to the plaintiff, by the change of grade of $2000. He would be entitled to no damages.

The fact that adjacent houses, along the street, have also been increased in value by 50 per cent, is no reason for ignoring this gain in the case of the plaintiff.

A distinction is drawn by the decisions between benefits common to properties near to, along the street in which the improvement is made, and benefits reaching beyond the immediate neighborhood of the improvement. Benefits of this latter class will not be regarded in ascertaining the damages, if any, to which the property owner is entitled. On the contrary, the fact that benefit is common to properties along the street in which the improvement is, furnishes no reason for refusing to consider this benefit, as a set-off against any disadvantages which have resulted to the plaintiff's property. Says, Walling, Justice, in Gaughn vs. Scranton City, 266 Pa. 586, after remarking that "the abutting owner is not to be charged with any general indefinite appreciation of the value of the property in the neighborhood, as distinguished from special benefits to his and other improvements * * * * However, the difference between the two, because of the direct contact of the latter with the improvement, is marked, and must be considered by the jury. The city must be given credit for the special advantages thereby accruing, although the advantages also accrue to other properties upon the line of improvement."

The writer characterizes as a "crucial error" the court's limiting the benefits (to be set off against the damages) "to such as were special to plaintiff's property as compared with other properties on the line of improvement, when it should have been as compared with other properties in the neighborhood."

Lyon vs. Dunmore Borough, 80 Super. 590 adopts the same view.

It is necessary, then, to reverse the judgment.